No. 83-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE QUESTION PRESENTED IS IMPORTANT

Since the Government is uniquely knowledgeable concerning its own prosecutorial activities, it bears notice at the outset that the Brief in Opposition does not dispute that "with increasing frequency, the United States has subpoenaed an attorney to appear before a grand jury in order to compel testimony which may implicate his client in criminal conduct which the grand jury is investigating." (Pet. 5)[1] See also Brief of Amicus

[1] Throughout this brief: "Pet." and "Pet. App." will refer respectively to the Petition for Certiorari and the Appendix thereto; "Br. Opp." will refer to the Petition for United States in Opposition in this case.

Curiae National Association of Criminal Defense Lawyers, pp. 1-2, 6. This practice is further exemplified by an appellate decision which issued subsequent to the filing of the petition herein and on which respondent relies heavily.[2] As this latest case again illustrates, the question whether the attorney may be compelled to answer the government's inquiries often depends on the validity of an exception to the attorney-client privilege for questions concerning the identity of the client or the fees which he has paid to the attorney.[3]

The Government's practice bids fair to undermine the attorney-client relationship by putting clients at risk that matters which they have revealed in confidence to their attorneys will be made known to the government by the force of a grand jury subpoena. And, as we pointed out in the petition (pp. 11-14) it creates serious hazards for attorneys, who are ethically bound to preserve client confidence unless otherwise directed by the final order of a court. The government responds to this point by distorting it beyond recognition: "* * * petitioner seems to contend [that] Model Rule [of Professional conduct] 1.6 was intended to expand the scope of the attorney-client privilege." (Br. Opp. 14-15). It would so "seem[]" only to an "intelligence fired with a desire to pervert."[4] This portion of our petition made no substantive argument, let alone one for enlarging the attorney-client privilege in

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[2] *In Re Witnesses Before The Special March 1980 Grand Jury*, 729 F.2d 489 (C.A. 7, 1984) (hereafter "*March 1980 Grand Jury*").

[3] The court below has treated these issues as identical for purposes of analysis, *In Re Grand Jury Investigation, No. 83-2-35 (Durant)*, 723 F.2d 447, petition for certiorari pending, No. 83-1468. The government likewise does not differentiate between such cases; see its reliance on the opinions in *Durant* and in *March 1980 Grand Jury*.

[4] Cf. *Paraiso v. United States*, 207 U.S. 368, 372 (Holmes, J.).

light of the Model Rules.[5] What we did and do "contend" is that the present uncertainty with respect to the scope of the attorney-client privilege should authoritatively be resolved by this Court because under the new Rules of Professional Conduct, counsel are ethically bound to seek appellate instruction if there is legitimate doubt as to the merits of a claim of privilege (Pet. 14), and because of the importance of predictability "if the purpose of the attorney-client privilege is to be served" (*id.*, quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393). This submission remains uncontroverted.

II. THE QUESTION PRESENTED IS SUBSTANTIAL

A. The Brief in Opposition fails also to come to grips with our argument on the merits. While we do "not challenge * * * the observation by the court below ** * that the courts of appeals have unanimously embraced the general rule that the identity of the client accordingly is not within the scope of the attorney-client privilege because disclosure of the client's identity does not ordinarily entail the disclosure of confidential communications made by the client" (Br. Opp. 7), the principal thesis of the petition is that, at least in criminal litigation, the applicability of the attorney-client privilege to questions of client identity should not be decided on the basis of a "general rule" which treats identity as nonconfidential as a matter of law, for this defeats the purposes of the privilege as described in *Upjohn*, *supra*, and *Fisher v. United States*, 425 U.S. 391.

We rely on *Fisher* not for the proposition that is misattributed to us at Br. Opp. 9-10, but for the following: 1) The availability of the privilege for questions concerning client identity should be determined in accordance with *Fisher* and *Upjohn* rather than on the basis of some *per se* rule or presumption against confidentiality. 2) There is an especially adverse impact on the privilege's

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[5] The heading of this section was "The Question Is of Major Significance to the Legal Profession and the Administration of Justice." (Pet. 11)

purpose to foster the attorney-client relationship where information is sought to be compelled from the attorney which could not be compelled from the client. 3) The privilege *against self-incrimination* is pertinent under this analysis not because an attorney may claim that privilege on behalf of his client (which Part II of *Fisher*, 425 U.S. at 396-401, disallows), but because (as Part III of *Fisher*, *id.* at 402-405, holds), information which the client cannot be forced to reveal because of that privilege (or any other) cannot be coerced from the attorney when he received that information as part of the attorney-client relationship. 4) Because the "last link" exception is narrower than the privilege against self-incrimination it is insufficient to protect the client from the coerced disclosure of confidential communications by his attorney. Respondent thus simply assumes the answer to the ultimate legal issue when it asserts that "the potential disclosure of a confidential communicatoin[] is wholly absent" here (Br. Opp. 10).[6]

Of course we agree that the purpose of the attorney-client privilege is "protecting confidential communications" (Br. Opp. 9). The very phrasing of the question presented in terms of the disclosure of "confidential com-

[6] Given the respondent's approach, it bears emphasis that the court below did not find as a fact that Doe intended that the existence of his relationship with his attorney or any part of the legal advice he secured be treated as nonconfidential; nor did the court below find that the confidentiality of the relationship had been breached in any way, which would nullify the privilege. See 8 Wigmore, *Evidence* § 2311 (McNaughton Rev. 1961). Moreover, contrary to Br. Opp. 7-8, we *do* "challenge the holding by the court below that disclosure of his identity in the circumstances of this case would not have the effect of revealing the substance of any confidential communications he made to attorney Gordon." However, we did not directly discuss this portion of the Sixth Circuit's opinion, because it deals with the question whether a "second exception" to the "general rule" (articulated by the court in the *Durant* case, Pet. App. 36a) applies here; this issue is subordinate to the question whether analysis properly proceeds from a "general rule that the identity of a client * * * is not within the protective ambit of the attorney-client privilege" (Pet. App. 7a).

munications" (Pet. i) recognizes that the existence of a confidential communication is a necessary condition for sustaining the privilege. Far from contending, as the government says we do, that *Fisher* held "that a lawyer is privileged from releasing documents merely because they might incriminate his client * * * under the rubric of the attorney-client relationship" (Br. Opp. 9), we said expressly that "the rationale of *Fisher* * * * extends to all confidential communications * * *" (Pet. 11).

B. The government contends that this case does not provide a suitable vehicle for consideration of the identity exception to the attorney-client privilege by this Court because the district court below determined that disclosure of Doe's identity would not be the last link in a chain of otherwise incriminating evidence; it asserts the last link exception "would be inapplicable in this case by virtue of the district court's finding, which *was not disturbed by the Court of Appeals.*" (Br. Opp. 12-13, emphasis added). The district court's finding "was not disturbed by the Court of Appeals" because that court has refused as a matter of law to recognize the last link exception. The court made clear in the companion *Durant* case that client identity is not privileged *even if* its disclosure *would* provide the "last link in an existing chain of incriminating evidence likely to lead to the client's indictment." (*Durant*, Pet. App. 37a, quoting *In re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026, 1027 (C.A. 5, 1982 en banc)), which in turn followed *In re Grand Jury Proceedings* (*United States v. Jones*), 517 F.2d 666 (C.A. 5, 1975). The Sixth Circuit thus categorically "reject[ed] the last link exception as articulated in *Pavlick*" (*Durant*, Pet. App. 38a). This conflict of decisions (as to which the Eleventh Circuit is in accord with the Fifth)[7] is squarely raised by this case

[7] Contrary to Br. Opp. 11, n.6, the Eleventh Circuit in *Twist* [*In re Grand Jury Proceedings* (*Twist*), 689 F.2d 1351, (C.A. 11, 1982)] and *Slaughter* [*In re Grand Jury Subpoena* (*Slaughter*), 694 F.2d 1958 (1982] expressly adopted the last link exception. To

because, if the *Pavlick* exception is approved, the Sixth Circuit will be required on remand to review the district court finding on which the government relies.[8]

The government further suggests that the conflict need not be resolved in this case because "it seems likely that the recent Seventh and Ninth Circuit decisions clarifying the governing principles and the meaning of *Baird* will dispel whatever confusion may linger in the lower courts * * *." (Br. Opp. 11-12). This is merely wishful thinking. It assumes that because the Sixth, Seventh and Ninth Circuit have adopted analyses which are satisfactory to the government the circuits which have not yet ruled will follow them, and the Fifth and Eleventh Circuits will abandon their prior decisions.

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be sure, the *Twist* opinion cited *Pavlick* only with respect to the "crime or fraud" exception to the attorney-client privilege (see Br. Opp. 11, n.6), but it approved the "last link" exception in the next paragraph, 689 F.2d at 1352-1353, citing *Jones, supra*. *Slaughter* also cited *Jones* on this point, 694 F.2d at 1260. The government's observation that *Slaughter* "stresses that the privilege applies only where confidential communications would be disclosed" (Br. Opp. 11, n.6) is simply irrelevant to the existence of a conflict, and is entirely consistent with our position. See pp. 4-5, *supra*.

[8] In the brief for the United States in Opposition in No. 83-1468 (*Durant v. United States*) the government argues that "whatever the precise reasoning or language employed, there is no indication of any conflict in the circuits with respect to the *result* that the courts of appeals have reached in these cases." (*Id.* at 21, emphasis in original) In view of the proliferation of analyses of the identity issue offered by the courts of appeals, this argument brings to mind Justice Stewart's observation (dissenting in *United States v. Von's Grocery Co.*, 384 U.S. 270, 301): "The sole consistency that I can find is that in litigation under § 7 [of the Clayton Act] the Government always wins." This is not a principled basis for denying the existence of a conflict worthy of this Court's attention. Rather, as the Sixth Circuit's express rejection of the reasoning in *Pavlick* makes clear, the differences between the courts of appeals are not confined to mere nuances of language, but involve the scope and substance of the privilege. As such, they may well affect the *result* of particular cases, including this one for the reason stated in the text above.

C. The government proposes a wholesale revision of the law of attorney-client privilege when it suggests that, notwithstanding the privilege, "persons directly affected and the public have a right to know on whose behalf a lawyer acts in openly invoking the established statutory procedure for creating a corporation." (Br. Opp. at 13.) It is the law of the state of incorporation that determines what information must be disclosed in connection with the creation of corporate bodies, and the general rule is that shareholders or real parties in interest do *not* have to be disclosed. *See, e.g.*, Del. Gen. Corp. Law, ch. 1, Title 8 § 102 (1974); N.Y. Bus. Corp. Law § 402 (McKinney, 1963); Page's Ohio Code Ann., Gen. Corp. Law § 1701.04 (1978 repl. vol.).

The rule protecting all attorney-client communications "where legal advice of any kind is sought," 8 Wigmore, *Evidence* § 2294 (McNaughton rev. 1961), is not nullified, as the government now argues, simply because advice is sought with respect to matters of public record, for

> [t]he rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court; but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and objections, although the purpose to be correct a defect of title by obtaining a release, to avoid litigation by compromise, to ascertain what acts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes not connected with a suit in court.

8 Wigmore, *supra* at 566 quoting *Foster v. Hall*, 29 Mass. (12 Pick) 89, 98 (1831).[9] See also H. Drinker,

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[9] Professor Wigmore summarized the rule as follows:

> Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protec-

Legal Ethics 135 (1953)): "[T]he privilege is not nullified by the fact that the circumstances to be disclosed are part of a public record * * *".

CONCLUSION

For the foregoing reasons as well as those stated in the Petition for a Writ of Certiorari the petition should be granted.

Respectfully submitted,

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tion, though in itself it were merely commercial in nature—as where the financial condition of a shareholder is discussed in the course of a proceeding to enforce a claim against a corporation. [Wigmore, *supra*, § 2296 at 567.]

Amicus Brief

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers (NACDL), a District of Columbia non-profit corporation, is a voluntary association made up of over 3,000 criminal defense lawyers from all over the United States.

This organization seeks to improve the quality and administration of justice by protecting and insuring by rule of law the individual rights guararteed by state and federal constitutions, and to foster and expand the quality and scope of criminal defense advocacy.

Many members of the NACDL have expressed concern and dismay at the increasing tendency of federal prosecutors to attempt to obtain information from attorneys about their clients, in order to pursue and complete criminal in-

vestigations of the client. This brief addresses a case involving an extreme example of that pernicious practice.

STATEMENT OF THE CASE

Attorney Larry S. Gordon of Cleveland, Ohio, has been ordered to disclose to a federal grand jury the name of one of his clients. The government has asserted that it desires this information in order to learn who owns a group of corporations formed by Mr. Gordon's law firm, because the corporations have "been employed to defeat and evade taxes through fraudulent manipulation of the corporate surtax exemption," and further because "by concealing ownership in corporations, individual income taxes have been evaded." Memorandum In Support Of The Motion Of The United States Of America For An Order Compelling Larry S. Gordon To Testify Before The Grand Jury, filed 1/26/82, p. 13. [hereafter referred to as Government Memorandum In Support Of Motion To Compel].

Mr. Gordon has refused to identify his client because to do so will provide the government with evidence with which Mr. Gordon's client will or may be indicted. His refusal is grounded upon the attorney-client privilege.

This brief is submitted in support of Mr. Gordon's petition for writ of certiorari by the National Association of Criminal Defense Lawyers, whose members have a direct and serious interest in the issues presented in this case.

SUMMARY OF ARGUMENT

This Court should resolve the conflict among the circuits as to whether the attorney-client privilege authorizes a lawyer to refuse to identify his client to a grand jury when the identification of the client will provide the last link or a substantial probative link in the government's case against the attorney's client.

ARGUMENT

I.

THE CIRCUIT CONFLICT AS TO THE "LAST LINK" EXCEPTION SHOULD BE RESOLVED

A conflict exists between the Sixth Circuit's ruling and decisions of the Fifth and Eleventh Circuits. The Sixth Circuit declined to adopt what it called the "last link" exception to the general rule that a lawyer must disclose the identity of his client to a grand jury. The Sixth Circuit reasoned that the exception "is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege." *In re Grand Jury Investigation No. 83-2-35 (Durant)*, 723 F.2d 447, 454 (6th Cir. 1983), *incorporated by reference into Doe* v. *United States*, 722 F.2d 303, 307 (6th Cir. 1983) (emphasis the Court's).

The two contrary rulings are *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc), and *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351, 1352 (11th Cir. 1982); *see also In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 674 (5th Cir. 1975).

The Sixth Circuit is wrong in asserting that identity of the client cannot be a confidential communication. The client's identity obviously must be communicated to the lawyer by the client.* And practicing lawyers know from experience that the identity of the client can and often is

* "To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source." *Colton* v. *United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

a carefully guarded secret, which the lawyer is duty-bound not to reveal outside the confines of his office.

This exception to the general rule requiring disclosure of a client's identity is an important one. If this exception is rejected, lawyers can and will be put in the position of being compelled to provide the government with the evidence with which to indict and to convict the lawyer's own clients. Until now the courts have been careful to avoid that result. The Sixth Circuit's decision conflicts with the policy underlying the attorney-client privilege, as well as with the decisions of two other circuits.

In *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 674 (5th Cir. 1975), the Court said:

> ". . . The purpose of the privilege would be undermined if people were required to confide in lawyers at the peril of compulsory disclosure every time the government decided to subpoena attorneys it believed represented particular suspected individuals. Just as the client's verbal communications are protected, it follows that other information, not normally privileged, should also be protected when so much of the substance of the communications is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions. . . ."

II.

THE GOVERNMENT HAS CONCEDED THAT THE LAST LINK EXCEPTION GOVERNS THIS CASE

In the papers submitted by the government to the District Judge in support of the motion to compel attorney Gordon to identify his client, the government asserted that the identity of Gordon's client will provide the government with the evidence it needs to prosecute the client. In that motion, the government said (Government Memorandum In Support of Motion To Compel, pp. 7, 13, 15):

"In the cause sub judice the government has sought to discover the name of the person or persons who requested or caused the companies involved to be incorporated. This information is vital in terms of establishing ownership of the corporations, a necessity in a corporate tax fraud investigation of this nature.

• • •

"In this case it is clear that Mr. Gordon's firm played a major role in the incorporation of the twelve companies alluded to earlier in this Memorandum. It is equally clear when examining the attached Affidavit [submitted *in camera* to the District Judge] that a carefully constructed maze of corporations with concealed ownership has been employed to defeat and evade taxes through fraudulent manipulation of the corporate surtax exemption. The Affidavit also reflects that by concealing ownership in corporations, individual income taxes have been evaded.

"Thus as in *Billingsley*, the incorporation of each entity was a cardinal part of the scheme to defraud.

• • •

"In the view of the government the Affidavit of the Agent reveals the existence of a massive scheme to defraud the United States by manipulation of a large number of corporations. Some of the corporations are the subject matter of this motion and were clients of Mr. Gordon's firm during the taxable years which the investigation has focused on. In addition, Sturman himself was a client during those years."

In light of these assertions, if Mr. Gordon is required to reveal the identity of his client, the client will probably be indicted and Mr. Gordon will be one of the key government witnesses at the ensuing trial. This result is noxious to the profession, and at odds with the purposes of the attorney-client privilege.

CONCLUSION

There is an increasing tendency among federal prosecutors to force lawyers to testify against their own clients. This case provides an example of how this practice can pit lawyer against client. We believe this issue should be resolved, and resolved promptly, by this Court.

Respectfully submitted,

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